Mediation: The Future of Dispute Resolution in Contemporary Scots Family Law

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Abstract

The merits of family mediation have been capitalised on throughout the world, with many jurisdictions embracing the method as an alternative to court-based dispute resolution. It has now become routine practice in several countries, including the USA, with its influence continuing to grow throughout Europe, South Africa and Australia. Indeed, some countries have even made it compulsory. However, to date, the Scottish Government has failed to exploit its usefulness. This paper will measure the success of the implementation of family mediation domestically and internationally. Through building upon the lessons which these countries have learnt, recommendations will be made which may guide the future approach taken in Scotland. It will be contended that the ‘Scandinavian’ approach which makes family mediation compulsory not only illustrates how successful the method can be but also provides much needed guidance as to how best to implement legislation to ensure its effective transition into the dispute resolution framework in contemporary Scots family law.

1. Introduction

Mediation is not a new concept. In fact, the idea of parties in dispute turning to someone else to help them ‘sort it out’ is so obvious that our progenitors did it without much comment. Mediation is said to have been implemented throughout Ancient Greece from around the 8th century BC onwards1 and in China it can be traced back to the time of Confucius.2 Despite this, it is only in recent years that governments across the world have begun to embrace this method of dispute resolution as a viable alternative to civil litigation in disputes encompassing family law issues. Indeed, some countries have even made it compulsory. However, this has not been the case in Scotland where the Scottish Government has failed to capitalise on its usefulness. This is despite the fact that for nearly two decades, academic discussion and popular articles alike have argued for an increased use of mediation in Scotland for determining family law related disputes.

Family law disputes are unique in that they involve heightened emotional considerations which encompass feelings of hostility, bitterness, resentment, fear and embarrassment. Nonetheless, there is a necessity for the preservation of an on-going relationship in many cases due to the fact that children are involved. It is, therefore,

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imperative that separating couples have the opportunity to consider their problems in family mediation before they are subjected to the adversarial and confrontational atmosphere of the court-process.

This paper will contend that the Scottish Government should take note of the increasing and successful use of mediation internationally and adopt a more proactive stance in embracing this effective alternative by initiating its wider use in family law disputes. This paper will also seek to determine whether this would be best achieved through a move towards mandatory mediation, as is witnessed in Scandinavian countries such as Norway and Sweden. It will be argued that the ‘Scandinavian’ experience not only illustrates how successful mediation can be but can also provide much needed guidance as to how best to implement the method legislatively to ensure its successful transition into the dispute resolution framework within contemporary Scots family law.

It will be demonstrated that some major flaws exist within the present system in Scotland. A failure to capitalise on mediation is compounded by the fact that there are substantial court back-logs and an average of more than 10,000 divorces every year in Scotland, on top of a rising number of civil partnership dissolutions. This is not to mention the number of unmarried cohabiting couples who split every year, with just over half of all children in Scotland born to unmarried parents. These figures illustrate just how important it is that the Scottish Government implements a more effective method of dispute resolution which can ease the ever increasing work load placed on our civil court system and which, more importantly, better serves the interests of the parties, their children and wider society both financially and otherwise.

However, despite these facts and the long-awaited report of the Scottish Civil Courts Review, chaired by Lord Gill, the system in Scotland is yet to change. The Gill Review was blunt in its assessment of the current civil justice system, stating that the current service was ‘slow, inefficient and expensive’, incorporating procedures which were ‘antiquated’ and remedies which were ‘inadequate’. Family law disputes encompassing separation, divorce and several issues relating to children do

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6 *ibid* i.
certainly fall within these criticisms. Rather frustratingly, the Gill Review provided meagre praise for mediation in general and offered no real commitment to bring it to the forefront of dispute resolution in Scots law. This is despite evidence that a significant number of respondents could see the value of mediation, particularly as a method of resolving disputes at an early stage. This is extremely disappointing and ultimately provided the motivation for this paper.

This paper will be structured as follows: Part II will define the concept of family mediation; Part III will consider the background to the method, including the origination of mediation in Scotland, its evolution in Scots family law and how it is implemented at present; Part IV will examine the major strengths of mediation; Part V will encompass a comparative study reflecting upon the use of family mediation internationally; and finally, in Part VI, recommendations will be made as to the steps which the Scottish Government should take in regard to family mediation in Scotland.

2. Defining Family Mediation

There are several definitions of mediation and more specifically, ‘family mediation’, offered by academics and official sources alike. However, a succinct definition is provided by the United Kingdom Government which defines family mediation as ‘(...) a process in which an impartial third person, the mediator, assists couples considering separation or divorce to meet together to deal with the arrangements which need to be made for the future.’

In Scotland, family mediation is a voluntary process, during which the mediator acts as a facilitator, aiding the parties to the dispute to reach an agreement. The mediator must remain nonpartisan in order to ensure the success of the process. They will help the parties who have issues or problems to discuss how these issues can be resolved and will focus on effective communication, mutual understanding and information gathering. This allows the parties to identify common ground and to find the best way forward. Importantly, the mediator does not make a decision or ‘find’ for any of the parties. Essentially, mediation has a multi-disciplinary character and can be seen as a socio-legal process. Indeed, the qualities, skills and

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7 A study published by Norwich Union (now Aviva) found that the average divorce costs a couple around £39,000 - this figure includes outlays such as the cost of setting up a new home, buying personal items and lost personal savings. As for legal fees, the study estimated that, on average, each divorcée spends around £1,800: Aviva, ‘Brits spend over £4 billion on divorce’ (13 December 2006) <http://www.aviva.co.uk/media-centre/story/2935/brits-spend-over-4-billion-on-divorce/> accessed 12 June 2012.

8 Gill Review (n 5) 165.

9 Lord Chancellor’s Department, Looking to the Future: Mediation and the Ground for Divorce (White Paper, Cm 27990 1995) [5.4].
qualifications required of mediators are some of the inherent issues at the heart of this topic.

An agreement between the parties to mediation, drawn up by the mediator, is referred to as a Memorandum of Understanding but it does not represent a legally binding contract. It must be transformed into a legally binding contract before it will have any legal force. In this sense, solicitors are not completely removed from the process as they will be required to draft the agreements which the courts will then make legally binding. Arrangements covered in a Memorandum of Understanding may include reaching a decision as to residence and contact agreements regarding any children of the relationship. This is in addition to any property issues to be resolved or financial settlements to be made which may include child maintenance. Family mediation is not only implemented in disputes involving children. ‘All-issues’ family mediation is now available, which can be implemented to deal with all financial and property matters as well as issues relating to children.

One of the main criticisms levelled at the process is that the mediator is not truly impartial in their role. This may lead to situations where the agreement reached by the parties reflects the views of the mediator as opposed to those of the parties themselves. However, this is a flawed argument in that it is unlikely that two adults who may harbour their own strong views, will be dictated to by a stranger as to what is the best course of action for them. Indeed, research in England has shown that the majority of those who attend mediation believed that the mediator had been impartial. In any case, mediation avoids the clear ‘ordering’ by a judge in court as to what the parties should do. This must surely be seen as an advantage, providing the parties with the ability to determine their own future.

In terms of the process itself, it is essential to note from the outset that mediation is not reconciliation. This is a common misconception and indeed can be seen to have held back the progress of mediation as a method of alternative dispute resolution (ADR) in the early days of its implementation. Reconciliation is an entirely different process which is solely an attempt to keep a couple together and which is carried out by counsellors, not mediators. Nonetheless, reconciliation via mediation is not impossible. The coming together of the parties in the same room and the discussion of matters in a civil manner has the ability to help the parties realise that the marriage may be salvageable after all.

3. Mediation in Scotland

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11 The falsely held belief that mediation could only be used when there were children involved can be said to have hindered the uptake of the method.
13 The research on the Family Mediation Pilot Project led by Professor Davis was based on a sample of 4,593 cases in which couples were offered mediation as an alternative to litigation. 82% of participants considered that the mediator had been impartial and 70% had found mediation very helpful or fairly helpful: Gwyn Bevan and Gwynn Davis, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission 2000).
A. The Origination of Family Mediation in Scots Family Law

It is widely accepted that family mediation, as we know it today, emanated from the United States in the mid-twentieth century\(^{14}\) and arrived in Britain in the late 1970’s.\(^{15}\) In the United Kingdom, it was implemented first in Bristol in 1979 as an innovative local service.\(^{16}\) The pioneering architects of the Bristol Courts Family Conciliation Service, the UK’s first local family conciliation service (as it was known then), may be viewed as the founding fathers of mediation in the United Kingdom. The concept then percolated throughout England, finally arriving in Scotland in the 1980’s.\(^{17}\)

Mediation came to the forefront in Scotland in 1984 under the aegis of the voluntary body known as the Scottish Family Conciliation Service.\(^{18}\) It has since evolved to cover several regions across Scotland, under the general advocacy of a national umbrella body, Family Mediation Scotland (‘FMS’).\(^{19}\) which was created in 1987.\(^{20}\) FMS was originally formed with a remit covering only those cases involving children\(^{21}\) but is today part of the larger body, Relationships Scotland,\(^{22}\) and has since developed into an all-encompassing mediation service, dealing with disputes relating to finance and property as well as children. In addition to this founding organisation, the other main provider is Comprehensive Accredited Lawyer Mediators (‘CALM’). Furthermore, there are now several commercial mediation services in Scotland, such as Core Mediation, in addition to smaller independent mediation providers. Therefore, mediation is now a widely available service in Scotland but, despite this widespread availability, there is not an equally matched awareness or indeed encouragement of this method and hence uptake remains low in comparison to court-based dispute resolution.

B. Current Rules and Provisions for Family Mediation in Scotland

In contrast with the position in England, mediation services in Scotland are wholly independent from the courts. Consequently, there is very little legislation or indeed case law, with the only tangible reference to the process coming from the Rules of Court. There are two identical Rules which read as follows:\(^{23}\)

\(^{15}\) Desmond Ellis and Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Sage 1996) 3.
\(^{18}\) ibid.
\(^{19}\) Whilst ‘conciliation’ was utilised in the name of the original body, this was replaced by ‘mediation’ in 1992 to reduce confusion surrounding the two different types of service.
\(^{20}\) Griffiths and Edwards (n 17) 539.
\(^{21}\) Known as ‘all-issues’ mediation.
\(^{22}\) A Scottish charity created by the merger between Relate Scotland (previously Couple Counselling Scotland) and FMS.
\(^{23}\) These are: (1) OCR 33.22 (as substituted by the Act of Sederunt (Family Proceedings in the Sheriff Court) 1996, SI 1996/2167) at Sch, para 12 and OCR 33A.22 for civil partners; and (2) RCS 49.23 (as
In any family action in which an order in relation to parental responsibility or parental rights is in issue, the court may, at any stage of the action where it considers appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation.

This empowers, but does not oblige, the courts to refer relevant parties involved in divorce or child-related disputes to mediation. A referral may be made at any stage in the proceedings, up until the final determination of the action. In reality, most referrals to mediation actually emanate from solicitors, voluntary aid agencies or indeed from the parties themselves, with the Rules rarely implemented in practice. This is primarily due to the recognition that the mediation process is voluntary. However, the courts have, on occasion, made an order in very exceptional circumstances, such as where the parties previously agreed to mediation in writing. Thus, at present, the courts in Scotland have a very limited role in the family mediation process.

The only statutory provisions relating to family mediation in Scotland are to be found in the Civil Evidence (Family Mediation) (Scotland) Act 1995 (the ‘1995 Act’). However, the 1995 Act provides no mechanism for the ordering or indeed encouragement of mediation. It merely provides statutory protection for confidentiality in relation to discussions which take place during the process, specifying that such information is not admissible in any civil proceedings. There are, however, some exceptions. For example, information regarding any contract entered into is admissible. The 1995 Act was enacted due to the ambiguity, which arguably still exists in Scots law, about the extent to which statements made during the course of mediation are admissible as evidence in subsequent court proceedings.

It was thought that this uncertainty would inhibit full and frank discussions at mediation and hence the Government took steps to resolve the issue. The 1995 Act only covers mediation which is carried out by an ‘accredited mediator’ within an organisation approved by the Lord President. Despite confusion arising amended by the Act of Sederunt (Rules of the Court of Session Amendment No.3) (Miscellaneous) 1996, SI 1996/1756 at para 2(17) and by the Act of Sederunt (Rules of the Court of Session Amendment No.5) (Family Actions and Miscellaneous) 1996, SI 1996/2587 at para 2(16). Hereinafter the ‘Rules’.

24 Around 80% of parties who attend mediation have already consulted a solicitor at the point of referral: Jane Lewis, The Role of Mediation in Family Disputes in Scotland, Legal Studies Research Findings No 23 (Scottish Office Edinburgh 1999) 1. Clearly then, the legal system provides an important context for, and gateway to, mediation.

25 ibid.

26 Fiona Garwood, Trying To Get Us Talking: A Study of Rule of Court Referrals to Family Conciliation (Mediation) Services (Family Conciliation Scotland, Edinburgh 1992).


28 Civil Evidence (Family Mediation) (Scotland) Act 1995, s 1(1).

29 ibid s 2.

29 ibid s 2(1)(a).

30 This can be compared to the situation in England, where mediation has long since been recognised as a confidential and legally privileged process.

31 Civil Evidence (Family Mediation) (Scotland) Act 1995, ss 1(2) and (3).
as to who is indeed an accredited organisation, it is believed that the 1995 Act is a step in the right direction in terms of protecting family mediation’s confidentiality.

Separation is a deeply private matter involving sensitive information which many people will wish to remain confidential. In this sense, it could be averred that the confidentiality provided by mediation is actually a positive factor which should be embraced. Indeed, Scotland differs from other jurisdictions in the United Kingdom, in that family proceedings are generally conducted in public. It could be claimed that Scotland is behind the times in this regard. However, the confidential nature of mediation is not something which is wholly accepted as a positive feature of the process. It has been suggested that the development of Scots law may be harmed if complex and commercial disputes are resolved by mediation, hidden away from the courts and the legislature. Whilst this is a relevant consideration, it is questionable whether it is as an important consideration in terms of family law disputes. Such disputes are often very similar in nature, as well as straightforward in terms of legal complexity and in this sense it can be claimed that the law is well developed in this sector. There is also up-to-date legislation with which we are familiar. The real issue is the resolution of such issues in a quicker, cheaper and less adversarial manner. In any case, the supposed suffering of the development of the law must be balanced against the considerable benefits to the parties of confidential extrajudicial settlement.

In fact, as we have seen, there is actually an argument that the process should become more confidential in regard to the current narrow scope of the 1995 Act. In order for there to be a greater chance of open mediation, with an increased possibility of success, there must be a guarantee of confidentiality for all parties to mediation conducted by all mediator bodies, not simply those which are ‘accredited’. Until this is the case, we cannot claim wholeheartedly that confidentiality is a benefit of mediation. Ultimately, a failure to act upon this will affect the ability of family mediation to become an integral part of the civil justice system in Scotland.

C. Implementation and Success of Mediation at Present in Scotland

Obtaining an overview of the use of mediation and its success in Scotland today is not an easy task. This is partly due to the way in which the process and its use have developed in disparate sectors. In terms of family mediation, it would appear that, as in many parts of the world, awareness of the method amongst the courts and legal profession is growing. However, uptake remains low in Scotland as compared to England and Wales and may be attributed to a distinct lack of publicity in Scotland.

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33 Morag Wise QC notes that the legislation invites the interpretation that mediations outside its ambit are not shielded by the confidentiality cloak (in accordance with the rule of interpretation expressed by the maxim ‘expressio unius est exclusio alterius’): Wise (n 27) 45.
34 This public display of very private matters could actually be deemed to be an abuse of Article 8 ECHR, especially when we consider that the media rarely respect reporting restrictions on divorce matters under the Judicial Proceedings Act 1926.
35 See Gill Review (n 5) [5.20].
36 Family Law (Scotland) Act 2006.
37 It may also be attributed to a deeper acceptance of the findings of the Woolf Review in England and
This is illustrated by Scottish Government research into public awareness and perceptions of mediation in Scotland which showed that in March 2005 and August 2007, only just over 50% of those asked had actually heard of mediation, with awareness actually declining in that two year period.\textsuperscript{38} Even those who had heard of mediation struggled to define what it entailed.\textsuperscript{39}

Concern has also been expressed by those who claim that mediation is not sympathetic enough to cultural differences.\textsuperscript{40} In itself this is a disappointing finding and it is compounded by the fact that mediation is under-utilised, particularly by ethnic minority groups.\textsuperscript{41} These are two very important considerations as we must ensure equality of access to mediation and more importantly, equality of opportunity for all in Scotland. This is an apparent failing of family mediation in Scotland but is one which can and will be resolved by increased promotion of the method and its benefits. Furthermore, increased training of mediators and importantly, the recruitment of mediators from ethnic minorities or those who have specific knowledge of different cultures, will further aid this development.\textsuperscript{42} In fact, the publicising, training, accreditation and regulation of mediators are all important considerations which must be considered by the Scottish Government in more general terms and this is something which will be considered in detail in Part VI.

4. Litigation versus Mediation: The General Consensus

In his review of the civil court system, Lord Gill conceded that mediation could provide parties with more potential outcomes and more importantly, a desired outcome.\textsuperscript{43} However, nothing provides more authoritative endorsement of the method than a recent EU Directive,\textsuperscript{44} which states that, ‘(…) mediation should not be regarded as a poorer alternative to judicial proceedings.’\textsuperscript{45} This lends support to the method by highlighting the benefits whilst urging Member States to embrace it, declaring that they should, ‘(…) encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services’.\textsuperscript{46} The preamble to the Mediation Directive summarises many of the advantages of mediation:\textsuperscript{47}
The value of increasing the use of mediation rests principally in the advantages of the dispute resolution mechanism itself: quicker, simpler and more cost-efficient way to resolve disputes, which allows for taking into account a wider range of interests of the parties, with a greater chance of reaching an agreement which will voluntarily be respected, and which preserves an amicable and sustainable relationship between them.

A. Financial Considerations

Mediation is generally much cheaper in comparison to litigation where the fees can often be disproportionate to the amount in dispute.\(^{48}\) In the context of family mediation, the Ministry of Justice has outlined that mediation is both cheaper and quicker than litigation.\(^{49}\) Research in Scotland supports these findings.\(^{50}\) Access to justice is unaffordable for those members of society who may not be entitled to legal aid and who simply do not have the financial resources to pursue litigation. This is compounded by the fact that substantial awards may be made against the unsuccessful party.\(^{51}\) These issues are apparent in regard to divorce where there are significant financial considerations arising from the divorce itself. Not only do divorcees stand to suffer significant legal fees but they may also have to make large, often unexpected, payments to the other party. The latter obligation may arise if it is

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\(^{48}\) See Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002. This case was not a family law case but involved a simple transaction - the purchase of a motor car which had an apparent defect. While the level of dispute was fairly modest - around £6,000 - between them, the parties spent some £100,000 arguing over the claim.

\(^{49}\) Statistics show that mediation has proved to be quicker and cheaper than litigation in many cases. Mediated family cases take, on average, 110 days to complete, compared to 435 days for non-mediated cases to proceed through the court system. Meanwhile, Legal Services Commission figures for private family law children and finance cases funded through Legal Aid show an average cost per client of £535 in mediated cases compared to £2,823 in court cases: Ministry of Justice, ‘New headquarters for Kent Family Mediation Service’ (11 February 2011) <http://www.justice.gov.uk/news/press-releases/moj/press-release-110211a> accessed 12 June 2012.

\(^{50}\) Lewis (n 24) 3.

\(^{51}\) Studies suggest that mediation can widen access to justice for those who cannot afford litigation: see Fiona MacDonald, The Use of Mediation to Settle Civil Justice Disputes: A Review of Evidence, Legal Studies Research Findings No 50 (Scottish Executive 2004) 3.
adjudged that they have gained an economic advantage during the relationship or, if the other party stands to encounter serious economic hardship as a result of the separation.\textsuperscript{52} There may also be the economic burden of caring for any child of the relationship. In contrast, mediation costs a fraction of what litigation would entail, with this expense usually shared equally between the parties. In fact, mediation can even be provided for free, especially in cases involving children, as many of the organisations which provide these facilities are comprised of volunteer mediators.

Thus, mediation can benefit an already stretched legal system by saving valuable court time by ensuring less disputes end in litigation and actually go to court.\textsuperscript{53} Indeed, as will be demonstrated below, family mediation could also save the Scottish Government a considerable sum of money as well as providing several benefits beyond an immediate fiscal advantage.\textsuperscript{54}

\textbf{B. Consensual Contact as Opposed to an Adversarial Attack}

Not only does family mediation relieve the parties of the often extreme financial burden but it can also relieve them of the heavy emotional burden associated with litigation. Mediation should be conducted in a calm and consensual manner, in stark contrast to the adversarial and confrontational atmosphere of the court room. The prospect of attending court can often be daunting for both parties and can add to the feelings of hostility, potentially eradicating all possibility of a smooth process. Mediation decreases the likelihood of harmful outcomes such as the escalation of conflict, whereby the feelings of resentment, hostility and bitterness are accentuated, leading to increased conflict as opposed to a smoother, quicker resolution of the issues.\textsuperscript{55} Therefore, mediation can significantly reduce the amount of stress the parties encounter during the judicial process. Bringing the parties together to converse and negotiate can only be regarded as beneficial and often leads to a much quicker resolution of the issue.\textsuperscript{56} Furthermore, even if no agreement is reached, the process will at least have facilitated a degree of communication between the parties.

\textbf{C. Self-Determination}

Furthermore, mediation empowers the parties, allowing them to maintain control over their own affairs and assert their autonomy from the courts.\textsuperscript{57} In the judicial

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\item \textsuperscript{52} See Family Law (Scotland) Act 2006, ss 16-18.
\item \textsuperscript{53} MacDonald (n 51) 3.
\item \textsuperscript{54} Margaret Lynch, Director of the Scottish Mediation Network, has claimed that ‘A Scottish Mediation Pledge could save the Scottish Government upwards of £10 million a year or £40 million over one government term’: Scottish Mediation Network ‘Alternative Dispute Resolution can save Scotland money’ (29 June 2010) <http://www.scottishmediation.org.uk/news/article.asp?id=138> accessed 12 June 2012.
\item \textsuperscript{55} Ellis and Stuckless (n 15) 7.
\item \textsuperscript{56} Research conduction by the Scottish Government found that most mediated cases reached resolution and did so earlier than litigated ones: MacDonald (n 51) 3.
\item \textsuperscript{57} F Raitt, ‘Mediation as a form of Alternative Dispute Resolution: A Rejoinder’ (1995) 40 JLSS 45, 182.
\end{itemize}
process, there are strict rules of procedure, with the lawyers and judges in ultimate control of the agenda and the outcome. As Mayer asserts, ‘I believe this work continues to be about helping people keep control of their lives, even when in crisis, and about creating powerful and more democratic ways of dealing with important questions of social justice and peace.’ In so doing, he locates the principle of self-determination in democracy itself, which is indeed an interesting point.

In contrast, litigation may be said to enable couples to offload their problems on to the courts, leaving the judiciary to resolve the issue for them. This is an area all too often neglected by legal commentary on the matter. Quite simply, mediation not only empowers the parties but makes them face up to the issues which encompass not only their relationship but also their family. After all, they began the relationship on their own with no help from the state and it is, therefore, submitted that they should end the relationship with as little interference from the state as possible. Couples should be able to realise the wider benefit of mediation and embrace it by solving their problems via mutual co-operation and non-adversarial dispute resolution. The resolution of family law disputes must be considered from a legal perspective as ultimately it is the law which dictates the resolution of such issues, however, in considering this process, the vast benefits which mediation brings to the parties themselves as well as the state and ultimately society as a whole must be remembered. There may, however, be a role for the state to play where couples have reached a point where they are unable to help themselves. A satisfactory resolution via mediation may not be possible for all domestic disputes, such as in situations of domestic abuse. Nonetheless, we cannot underestimate the value attributed to this consideration of empowering the parties to take control of their own problems and their own future.

One of the main advantages of an agreement between the parties as opposed to the decision of the judge is that there is no notion of ‘winner’ and ‘loser’. This is something which is evident in court-based litigation, fuelling resentment for one party and providing an overwhelming sense of vindication for the ‘innocent party’. If the parties voluntarily reach an agreement, there is a much higher prospect that it will be enforced and abided by. Again, this is in stark comparison to a decision ultimately made by a judge in a court of law. Such a decision is regarded as the best solution to their individual issue by the court and is, therefore, imposed upon the parties. This often leads to further resentment, both of each other and of the justice system, which ultimately leads to a failure of the litigants to follow the decision of the court.


59 Recent research conducted into general mediation during pilots in Aberdeen and Glasgow Sheriff Courts found that 90% of all mediated cases reached an agreement and then implemented that agreement. This is compared to an implementation rate of 67% of judgements made in traditional court procedures: Margaret Ross and Douglas Bain, Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts (Scottish Executive 2010) [1.15]. However, the success rates of family mediation specifically are likely to be much higher due to the self-determination aspect regarding finances and any children to the relationship.

60 For example, in relation to child contact orders, although non-compliance is typically reported as 5% or less, it is evident that many other couples return to court in order to vary the terms of original
Most importantly, however, is the fact that these decisions often relate to children of the relationship who often stand to suffer most.\(^{61}\) It is here that we could delve into the complex issue of the ‘welfare’, ‘paramountcy’ or ‘best interests’ principle, as it is known\(^ {62}\) and consider whether litigation or mediation is the better solution. However, space simply does not allow all such avenues to be exhausted. At the same time, it should be noted that where a couple agree as to residence and contact arrangements for a child, the court is unlikely to intervene under the premise that ultimately ‘parents know best’\(^ {63}\). Indeed, an anecdote which illustrates this concept of judges forcing a decision on parties in relation to their children is noted by Banham-Hall when considering a scheme of court-annexed mediation at Milton Keynes County Court. She remarked that when meeting with parties and encouraging them to proceed with mediation, the judge would often say something along the lines of:\(^ {64}\)

> You should know your children better than anyone. Why do you think someone who doesn’t know your family at all (like me) should make decisions about it? The chances are no one would like my decision. It would be better to at least try and agree something. You might well be surprised: most people manage to agree at least something and many everything.

This statement encapsulates the many advantages of mediation and provides a measure of its success, while at the same time re-enforcing the point that couples should be made to take responsibility for their own families and their own actions.

Therefore, a successful mediation process can provide benefits to several parties beyond those directly involved with the dispute. Firstly, it can benefit any children involved, with a greater likelihood of agreements concerning them being reached at mediation and subsequently enforced and with the parents themselves on better terms due to the mediation process.\(^ {65}\) Secondly, it can also be beneficial to any subsequent relationships as it should emphasise to the parties the value of civil orders as ultimately they are not suitable to the parties: Fran Wasoff, *A Survey of Sheriff Clerks’ Perspectives on Child Contact Enforcements in Scottish Sheriff Courts* (Scottish Executive 2006) 3.

\(^{61}\) See Children (Scotland) Act 1995, ss 11-13 (Court Orders).

\(^{62}\) As contained in Children (Scotland) Act 1995, s 11(7)(a). The principle is said to connote: ‘A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare (…)’: *J v C* [1970] AC 668 (HL) 710-11 (Lord McDermott).

\(^{63}\) There is a multitude of case law relating to considerations the judge must have when making residence orders under the Children (Scotland) Act 1995, s 11(2)(c). These include, the views of the child (*Johnson v Johnson* 1972 SLT (Notes) 15), the age of the child (*Brixey v Lynas* 1997 SC (HL) 1) and the gender or sexual orientation of the parents (*Mouta v Portugal* (2001) 31 EHRR 47). However, it is also clear from such cases that where the parties agree, the court is unlikely to intervene unless neither party is suitable.


\(^{65}\) Studies have shown that those who participate in family mediation are more likely to come to a resolution, with three-quarters of cases resulting in a written or oral agreement about all or some of the issues discussed, with issues relating to children rather more likely to be resolved than those relating to finances: Lewis (n 24) 1.
conversation and co-operation in these situations, while at the same time reducing the amount of hostility and stress experienced.66

5. A Comparative Study - Lessons to be Learned Internationally

A. Reflections from Europe

Several European countries are at various stages of implementation and development of family mediation services. In the United Kingdom, there has been an increased use of general mediation in recent years. This has, however, mainly been confined to England and Wales. This has been, in part, facilitated by the existence of a formalised Community Legal Service and by the Court Procedure Rules brought in following the Woolf Review.67 Judges in England and Wales have been equipped with powers which enable them to encourage settlement or reference of disputes to ADR at the earliest stage, with litigation being viewed as a last resort.68

The recently enacted Family Proceedings Rules 201069 provide courts with significant powers to refer parties involved in a family dispute to mediation.70 The new pre-action protocol requires anyone contesting the terms of their separation and who wishes to issue proceedings in regard to children, property or money to attend a mediation awareness session before they can go to court.71 Parties may be granted an exemption for reasons such as domestic violence or child protection issues as well as bankruptcy.72

The reforms proposed by Lord Woolf have gained support from the judiciary. Notably, judges across England and Wales have collaborated with mediation providers to set-up schemes offering free or low-cost, time-limited mediation, held on court premises for litigants who had already commenced court proceedings.73 This can only be seen as a positive step. Mediation must indeed provide many benefits to litigation if those at the heart of the traditional dispute resolution process recognise its worth as a viable alternative to litigation.

66 ibid 3.
68 Factors to be taken into account when deciding costs issues include ‘the efforts made, if any before and during the proceedings in order to try and resolve the dispute’: Parts 1 and 44 Civil Procedure Rules (CPR). In deciding what order, if any, to make regarding costs, the court must have regard to all the circumstances, including the conduct of the parties before and during the proceedings. The court also has the power to impose a costs penalty on those who behave unreasonably during the course of litigation: CPR 26.4 and Part 44.
70 ibid Part 3.
72 ibid Annex C.
Evidently, the vast benefits of mediation are being capitalised on in England and Wales. The early success witnessed there is set to continue with the Ministry of Justice reporting that more separating couples in England and Wales were expected to try mediation in 2011 than in previous years. Official figures for legal aid funded mediations have risen from 400 in 1997 to almost 14,500 in 2009. Of these 14,500 publicly funded cases, more than two-thirds were successful. Despite this encouraging evidence, the Scottish Government is yet to adopt a similar approach.

There are, however, countries in Europe which have adopted a more radical approach. One such example is Norway, where family mediation is now mandatory but is confined to issues concerning children. Since 1993, married couples with children under the age of 16 must attend a mediation meeting before they can seek a divorce from the County Governor or the court. This has now been extended to include unmarried-cohabiting parents who have children under 16 years of age. A domestic violence exemption is also employed. The Norwegian approach has been so successful that the system has had to be expanded, with Denmark also set to follow the same route. However, a concern arising under such a model is whether the parties must make a concerted effort at the mediation and whether this should be monitored. It would be easy for a party to simply turn up at a meeting and declare that they have ‘attempted’ mediation, thereby satisfying the attendance criteria. Nonetheless, it does in fact seem to be successful and possibly those parties who harbour such attitudes find themselves swayed by the process once actually in attendance. Sweden shares a similar success story with its own form of compulsory family mediation: ‘cooperation talks’. It is said that 90% of those parents in Sweden who separate solve the questions regarding custody, residency and access to children with the help of such sessions or even entirely on their own.

Finland may be seen to provide the quintessential example in terms of how family mediation should be implemented in Scotland. The Finnish Marriage Act 1929 contains a whole chapter on family mediation, encompassing all things in regard to family mediation such as regulation as well as encouraging the parties to mediate. In section 20(1), it lays down that, ‘[d]isputes and legal matters arising in a family should primarily be settled in negotiations between the family members and decided by agreement.’ It does not, however, make mediation compulsory. Nonetheless, the sentiment conveyed by the legislation which stresses the importance of parties taking

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75 ibid.
76 Marriage Act 1991(as amended), s 26.
77 ibid s 23.
78 Parkinson, ‘Family Mediation and Mixed Messages Across Europe’ (n 2) 196.
79 Eva Ryrstedt, ‘The child’s right to speak in the process of determining questions of custody, residence or access’ in Miquel Martin-Casals and Jordi R Igualada (eds), The Role of Self-Determination in the Modernisation of Family Law in Europe (Girona 2005).
80 Marriage Act 1929 (as amended), Chapter 5.
control of their own affairs is difficult to disagree with and is something which was elaborated upon above. Importantly, the Finnish legislation provides for confidentiality in mediation thus offering a further reason for supporting such a model.

Further success stories of family mediation emanate from Spain. Since the mid-1980’s, the method has been implemented successfully by psychosocial teams annexed to the court system. Indeed, by the end of the 1980’s, there were family mediation services set-up throughout the Basque Country and in cities such as Madrid and Barcelona. Several of the Autonomous Communities in Spain such as Catalonia, Valencia and Galicia have now enacted legislation which regulates family mediation while at the same time prescribing the principles and procedures of the method. This is in addition to laying down the sanctions which mediators will incur for infringing the law.

It is evident that Scotland lags behind the rest of Europe in terms of incorporating family mediation into its legal system. The separating couples of Scotland, therefore, stand to lose out on the many advantages provided by this method due to a lack of knowledge and no significant encouragement from the state. The most valuable lessons to be learned emanate from the Scandinavian countries which have embraced family mediation and witnessed high success rates. This is due to the enactment of comprehensive legislation, such as that witnessed in Norway, which diverts parties to mediation at an early stage. More importantly, however, they have maintained a wider recognition that the parties should take responsibility for their own future beyond their relationship. Legislation in line with the Scandinavian approach which incorporates an element of compulsion, such is the case in Norway, appears to be the only way in which family mediation can be quickly, adequately and encouragingly incorporated in Scotland to ensure that the true potential of the method can be realised.

B. Reflections from Australia

Australia has also successfully embraced family mediation. Policy-makers took action in 2006 by enacting reforms which require parties to make a ‘genuine effort’ to resolve their dispute through a ‘family dispute resolution’ process before being eligible to apply for court orders. This requirement originated in reforms of the mid-1990’s, which merely encouraged parents to use mediation as the sole mechanism for resolving post-separation disputes regarding child care. Indeed, this is something which the Scottish Government could consider rather than simply implementing a mandatory provision. However, when compared to the more stringent Scandinavian approach, this provides parties who are set on their day in court with an apparent loophole.

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81 Martin-Casals (n 16) 7.
82 ibid.
83 Family Law Act 1975 (as amended by the Family Law Amendment (Shared Responsibility) Act 2006), s 60I.
Nonetheless, further lessons can be learned from Australia in that they too, like the European systems considered above, employ an exemption in cases of domestic violence or child abuse.\(^{84}\) In fact, around one quarter of cases are effectively ‘screened out’ of family mediation due to such considerations.\(^{85}\) There is a mechanism whereby those who are found to have made a false allegation for this purpose are made subject to a costs order by the court.\(^{86}\) In regard to the domestic violence safeguard, however, concern continues to be expressed regarding the protection afforded to victims of domestic violence during family mediation in Australia.\(^{87}\) Nevertheless, the Scottish Government policy could benefit from a similar exemption and this is a consideration which will require further investigation and planning in order to ensure that vulnerable persons are adequately protected during the mediation process. The mediator stands to play a key role in this regard in that their skill set should work to identify such instances and redress the balance in such situations should it be appropriate for mediation to proceed.

In Australia, the mediators or ‘family dispute resolution practitioners’ are tasked with the responsibility of determining whether or not the parties have indeed made a ‘genuine effort’ during mediation to reach an agreement.\(^{88}\) They will then be responsible for issuing the relevant certificates to such effect.\(^{89}\) Yet again, this form of mandatory mediation has led to several positive outcomes which Scotland could benefit from. First, it has significantly reduced the number of court applications for parenting orders.\(^{90}\) Secondly, the use of family law dispute resolution programmes has increased.\(^{91}\) Thirdly, levels of ‘client satisfaction’ were also reported to be relatively high following the reforms, even amongst those clients who required significant levels of support due to the complex and high conflict nature of their cases.\(^{92}\)

Nonetheless, some concerns have been raised regarding the mandatory mediation of family disputes in Australia. For example, unease was expressed over the so-called ‘juniorisation’ of mediation with under qualified individuals taking on the role of mediator.\(^{93}\) This criticism relates to the swelling of mediator ranks due to the increased use of mediation over a short period of time. A lack of knowledge, understanding and training meant that some mediators were not equipped for the

\(^{84}\) *ibid* s 60I(9).


\(^{86}\) Family Law Act 1975 (as amended by the Family Law Amendment (Shared Responsibility) Act 2006), s 117AB.

\(^{87}\) See R Field and M Brandon, ‘A conversation about the introduction of compulsory dispute resolution in Australia: some positive and negative issues for women’ (2007) 18 Australasian Dispute Resolution Journal 27.

\(^{88}\) The term ‘genuine effort’ is not defined in the legislation.

\(^{89}\) Family Law (Family Dispute Resolution Practitioners) Regulations 2008, Reg 26.

\(^{90}\) AIFS (n 85) 304.


\(^{92}\) AIFS (n 85) 21.

\(^{93}\) D Cooper and M Brandon, ‘Navigating the complexities of the family law dispute resolution system in parenting cases’ (2009) 23 AJFL 1 30, 42-43.
job. This has led the Australian Government to take steps to improve the training of mediators and accreditation standards. However, it is debatable whether or not the Scottish Government would need to take any radical action in this regard, considering the accreditation safeguards already provided by the two main family mediation services in Scotland - Relationships Scotland\textsuperscript{94} and CALM.\textsuperscript{95} Nonetheless, the Scottish Government will have to guarantee adequate safeguards are in place to ensure that these standards are not jeopardised as demand for mediators increases.

It is clear that the 2006 Australian law reforms have succeeded in providing greater awareness of family mediation. This has facilitated the provision of information to separating partners, allowing early intervention and resulting in a greater standardisation and regulation of such services. It is submitted that the Scottish Government could benefit from a consideration of the regulation of mediation in the event of it becoming compulsory as well as ensuring that adequate protection is provided for vulnerable groups within the process. Nonetheless, courts should not be afraid to penalise those who seek to bend the rules and avoid attempting mediation. Again, this supports the submission that mediation should become compulsory in Scots family law.

C. Reflections from Africa

In parts of Africa, mediation has also been embraced as an alternative method of dispute resolution. The question of family mediation came under the spotlight in the Zimbabwe High Court\textsuperscript{96}, where it was stated by Justice Smith that the adversarial system of litigation is often inimical to the interests of children when questions of divorce, custody and access are involved.\textsuperscript{97} The court referred to a comparative study of parties who went to mediation and others who left it up to the court to adjudicate their differences. This showed ‘(…) very clearly and definitely, that there was greater satisfaction among both children and parents in those cases where mediation was used as opposed to an adversarial approach.’\textsuperscript{98}

The mixed legal system operating within South Africa also provides ample scope for comparison with Scotland. Family mediation has played a more prominent role in this jurisdiction in recent times, particularly following recent court rulings

\textsuperscript{94} Initially trainee mediators are recruited by their Local Service and required to complete the Certificate in Family Mediation. This requires approximately 200 hours of learning, after which they become an Accredited Mediator and they can begin practising as a mediator in their Local Service. Accredited Mediators are required to continue their learning and become Registered Mediators.

\textsuperscript{95} All CALM mediators are family lawyers who have at least seven years of relevant family law experience and who have undergone a period of training as mediators before being accredited by the Law Society of Scotland as Family Law Mediators. CALM mediators are bound by a Code of Practice and each year must undergo continuing professional development training and assessment to maintain their accreditation.

\textsuperscript{96} G v G 2003 (5) SA 396 (Z).

\textsuperscript{97} \textit{ibid} 412A.

\textsuperscript{98} \textit{ibid} 412D-E.
which have ordered parties to compulsory mediation.⁹⁹ One of the most significant provisions in South Africa relates to children and mediation. South Africa has, therefore, recognised that mediation can benefit children of the relationship. This is reinforced by the provision in the Constitution which places an obligation on the mediator to ensure that separating couples put the interests of their children first during any mediation negotiations.¹⁰⁰

The implementation of a similar provision in Scotland would ensure that the best interests of the child are paramount, even at mediation. This is a well-established principle of the Scots law of parent and child, embodied in section 11(7)(a) of the Children (Scotland) Act 1995. Research in South Africa has supported the worth of such a provision having shown that those who come through mediation, as opposed to the courts, end with more advantageous agreements serving the best interests of the children.¹⁰¹ This includes better financial provision for their children in terms of maintenance as well as provision for education. Research has also shown that mediated agreements provide better definitions as to the non-custodial parent’s rights of access which is said to reduce the possibility of any future disputes in this regard.¹⁰² This means that the terms of such agreements are better understood by the parties themselves as they have produced them, as opposed to a court order being forced upon them by a judge. This reduces confusion and ultimately diminishes the need for subsequent court action as there is a mutually agreed contract between the parties which they understand and have made a commitment to observe.

6. The Future of Family Mediation in Scotland

A. Quiescent Government?

It has been contended throughout this paper that Scotland is being left behind in the development of mediation as an alternative method of dispute resolution. During a debate in the Scottish Parliament in 2007, several ministers raised this point with the clear sentiment that Scotland should embrace ADR methods in a fashion similar to their English counterparts.¹⁰³ Despite this, there has yet to be any significant change. This is disappointing, especially after evaluating the many advantages of family mediation. It would appear that the only criticism of such services in Scotland at

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⁹⁹ The most recent judgement dealing with the aspect of divorce mediation specifically was the judgement in Brownlee v Brownlee 2008/25274 (unreported) in the South Gauteng High Court. Acting Judge Brassey focussed on the duty of parties to a dispute to attempt to mediate and the obligation of the opposing attorneys to encourage mediation with their clients prior to the commencement of litigation. This ruling emanated from the previous decisions of Townsend-Turner and another v Morrow [2004] 1 ALL SA 235 (C) and Van den Berg v Le Roux [2003] 3 ALL SA 599 (NC) where the parties were effectively ordered to attend private mandatory family mediation by the court.


present is that they are not used widely enough. Roberts and Palmer claim that 'ADR, with its objective in 'settlement' and its principal institutional realisation in 'mediation', is now a virtually unremarkable feature of disputing cultures almost anywhere we look.'\textsuperscript{104} Anywhere that is, except in Scotland, which is yet to embrace family mediation at an official level and sadly it looks unlikely to in the near future.

The Gill Review proclaims in its introduction that ‘(…) minor modifications to the status quo are no longer an option’\textsuperscript{105} but recommended just that for mediation. Part of the Gill Review’s remit was to consider the role of mediation. However, it devoted only a solitary paragraph out of eighty-two to this consideration with no firm commitment to any substantial change. The commonly used sound-bite ‘Modern Laws for a Modern Scotland’\textsuperscript{106} could quite easily have been termed ‘Modern Dispute Resolution for a Modern Scotland’, something which seems to have been omitted. However, in order to achieve this feat there are several steps which require to be taken.

B. De Rigueur Dispute Resolution?

One of the main reasons that family mediation is not used enough in Scotland is due to its purely voluntary nature. At present, it is not compulsory or indeed actively encouraged to a satisfactory extent. This voluntary system is not working, especially with the existence of parties who will not rest before they have had their ‘day in court’. Of course, these parties will not cease to exist, even if mediation is made compulsory. It is debatable whether or not they should be afforded such a privilege. It can, therefore, be argued that family mediation should be made compulsory in Scotland, subject to certain qualifications such as exceptions in cases of spousal abuse.

As was considered in Part V, there are several jurisdictions which now have an element of compulsion and in doing so have witnessed unprecedented success in family mediation. Generally, this entails a judge diverting a case to mediation at an early stage in the proceedings and if the parties settle, no further judicial input will be required. Of course, there are some situations in which mediation would be wholly inappropriate and this would require good judgement from all parties involved in the process in order to identify such instances. Such considerations are particularly apparent in relationships where there is a significant power imbalance between the parties or where there has been a history of domestic abuse.\textsuperscript{107} With regards to the ‘significant power imbalance’ test, difficulties may arise in relation to its application. Research in New Zealand has shown that despite the male party often reserving the stronger financial position, they are not necessarily the strongest party

\textsuperscript{104} Palmer and Roberts (n 14) 359.
\textsuperscript{105} Gill Review (n 5) 1.
\textsuperscript{106} This is also the name of a report by the Scottish Executive: Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland (Scottish Executive, February 2007).
\textsuperscript{107} Gill Review (n 5) [5.26].
in terms of negotiating, particularly in custody disputes. Also, in situations where domestic abuse is suspected, this type of surreptitious control can be difficult to detect. However, it is important to note that mediation is entirely voluntary in Scotland and so a party who harboured any fears in this regard does not have to continue with mediation. Furthermore, even if mediation were to become compulsory, it is submitted that there should be a domestic abuse history exception. Nonetheless, in instances where such couples come through the screening process, adequate training of mediators to spot the signs of any such surreptitious control is essential and is something which is considered in greater detail below. On the other hand, it could be claimed that whilst there are already adequate filtering mechanisms in place to deal with such instances, no screening method is completely foolproof. Having said that, it should be noted that research in other jurisdictions has shown that mediation may still be helpful in some circumstances where an incidence of violence has occurred.

There are important legal ramifications which must be considered in terms of mandatory family mediation. There is an evident tension between requiring parties to mediate and the rights provided for under the European Convention for the Protection of Human Rights, specifically Article 6. The question is whether ordering parties to mediate would breach a litigant’s right to a fair trial under Article 6. The position remains unsettled. Indeed, the nature of the apparently conflicting stances is recognised in the Mediation Directive. This is certainly something which the Scottish Government will need to take into consideration as it is prohibited from enacting legislation which conflicts with human rights obligations. Nonetheless, it would appear that this is not a real danger, especially when other countries, such as those in Scandinavia, already have elements of compulsion and yet, do not appear to have breached human rights obligations. As was detailed above, mediated agreements must be passed on to the courts in order to be made legally binding. In this sense, the argument that mediation does not provide the same safeguards as litigation is weak. Courts are unlikely to turn mediation agreements into legally binding divorce orders if they are at odds with the stipulated laws in relation to divorce or child welfare or are completely unjust or unfair towards one party. In

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109 Myers and Wasoff (n 12) 261.
111 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, signed on 4 November 1950, entered into force on 3 September 1953 (the ‘EHCR’): ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.
112 It is out with the scope of this article to consider this issue in detail. The ECtHR decision in Alassini v Telecom Italia SpA [2010] 3 CMLR 17 suggests that it would not amount to such a breach of Art 6 ECHR. Whilst in Hickman v Blake Lapthorn [2005] EWHC 2714 (QB), it was observed that a party cannot be ordered to submit to mediation as that would be a breach of their Art 6 right.
113 Scotland Act 1998, s 29(2)(d).
114 Family Law (Scotland) Act 2006.
this sense, one of the most significant safeguards currently operating in regards to family mediation in Scotland is that mediation agreements must go through further screening to ensure that they are entirely suitable.

In light of these important considerations, there is still a clear attraction to a compulsory approach. This is true, particularly in Scotland, a jurisdiction which struggles with an already overcrowded and underfunded system. Indeed, Irvine supports this view and it is possible to cite studies which characterise compulsory mediation as the necessary 'helping hand' to introduce a new and unfamiliar process. For example, in Canada, there were positive outcomes from a large mandatory mediation programme for civil disputes which has given extended credence to the argument. Others are more sceptical, raising concerns in regard to forcing people into mediation. Purist mediators have an aversion to compulsion; a cornerstone of mediation is that it is a voluntary consensual process. Other mediators argue, inter alia, that mandatory mediation would firstly, unfairly impede the public's right of free access to the courts, and secondly, create another stratum of costly procedure and achieve statistically lower success rates.

Alternatively, the courts could impose monetary sanctions on those who unreasonably fail to consider mediation by penalising the party with the threat of non-recovery of legal costs. This, alongside the Government entrusting ‘triaging’ of family disputes to the legal profession, is believed to be the answer by some critics of the compulsory mediation route. It is submitted that compulsion would rapidly expose a large number of people to the positive experience of family mediation, thus leading to the kind of ‘take off’ which has been desired in Scotland for so long by so many.

C. The Need for ‘Official’ Support - Government and Judicial Initiatives

As highlighted above, there are worryingly low levels of awareness of mediation in Scotland. Therefore, there is a clear need for the proactive marketing of family mediation in order to communicate directly with potential beneficiaries and educate them as to the availability of the method. The Scottish Government must publicise its support for family mediation, ensuring that its policy is clear in this regard. The current Rules of Court could be altered to include a compulsory element which, as in so many other jurisdictions, would enable judges to compel litigants to use mediation in appropriate situations. As we have seen, the current Rules are rarely implemented and are unlikely to be in the future absent a form of mandatory provision. This is primarily due to the Scottish Government’s lack of emphasis on

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119 Wise (n 27) 46.
120 As has been witnessed in England and South Africa.
family mediation and the voluntary nature of the service. This complaint is also evident south of the border where, despite the United Kingdom Government’s emphasis on mediation in England and Wales, in over one-third of cases, mediation was not even mentioned to the parties by the solicitors involved.\(^{122}\)

Alternatively, a change in policy could in turn lead to a judicial decision comparable to that in the South African case of *Brownlee v Brownlee*.\(^ {123}\) Proponents of mediation in South Africa greeted the decision as a landmark comparable to *Dunnett v Railtrack*\(^ {124}\) in England and Wales, a case whose overall importance should not be overlooked. The decision in *Railtrack* made it abundantly clear that parties and their legal advisers must consider mediation and other forms of ADR, especially where this has been suggested by the court itself. Flatly refusing to consider such methods, as was the case in *Railtrack*, means that costs may not be given to the winning party. Similarly in *Brownlee*, a judge imposed a costs sanction as a direct consequence of a failure of the parties to mediate for the first time. However, rather interestingly, the sanction was imposed not on the parties but on their solicitors. This is something which has not yet been seen in England and Wales and certainly not in Scotland. Indeed, Acting Judge Brassey referred to the English experience, highlighting the benefits and success witnessed in that jurisdiction as well as the support for family mediation in South Africa:\(^ {125}\)

I am given to understand that in England the all but obligatory recourse to mediation has profoundly improved the process of dispute resolution. Parties resolve their problems so much more cheaply as a result and the burden on the court rolls has been considerably lightened. Informed estimates put the success rate of mediation at between eighty and ninety percent. But (...) I can say with confidence that the parties would have been well served if they had submitted this dispute to mediation and then fought out, if fight they must, the one or two issues of fundamental concern to them.

Nonetheless, the approach in *Brownlee* presents a fresh warning to the legal profession as to the action judges may take if solicitors fail to advise their clients about mediation. This is something which both the Court of Appeal in *Halsey v Milton Keynes NHS Trust*\(^ {126}\) and the Solicitors Code of Conduct\(^ {127}\) have effectively made a professional duty in England and Wales.

A similar decision north of the border would stand Scotland in better stead in terms of ensuring family mediation is actively encouraged and that those in the legal profession who fail to advise to this avail are held accountable for their actions. Indeed, it is submitted that the legal profession has a key role to play in ensuring that mediation is a success in Scotland. However, rather than wait for the profession to

\(^{122}\) National Audit Office, *Legal Aid and Mediation for people involved in family breakdown* (2006-7, HC 256 HMSO) 5.

\(^{123}\) *Brownlee v Brownlee* 2008/25274. South Gauteng High Court (unreported).

\(^{124}\) *Dunnett v Railtrack* [2002] 2 All ER 850.

\(^{125}\) *Brownlee* (n 123) 18.

\(^{126}\) *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920.

\(^{127}\) See Practice Direction 3A which supplements the court’s powers in Part 3 of the Family Procedure Rules 2010 to encourage and facilitate the use of alternative dispute resolution.
take the initiative and encourage the method more fervently, or for a Scottish court to decide the matter on a similar basis to Railtrack or Brownlee, the Scottish Government would be better advised to reform the existing Rules of Court to incorporate a compulsory element. They could also enact a comprehensive piece of legislation on family mediation which supports this, rather than relying on judicial precedent. As detailed above, such legislation should be comparable to the provisions of Chapter 5 of the Marriage Act 1929 in Finland. This would definitively lay down government policy in regard to family mediation at the same time as publicising and providing for all aspects of family mediation services in Scotland. Such a piece of legislation would provide for mediation to be compulsory except in certain circumstances, such as domestic abuse, as well as providing for all other aspects of family mediation including confidentiality and regulation.

Of course, in order for mediation to succeed, any official support must also encompass financial support. Financial consideration is a topic which has been discussed previously in Part IV. It is clear that the more money the Scottish Government provides for the implementation and maintenance of family mediation services, the more they stand to gain from it. Steps such as offering financial incentives for mediation providers to expand their service, particularly in rural areas, have already been taken in England and Wales. There is a clear need for publicly funded family mediation both in terms of ensuring availability and more consistent access throughout the country. In the early stages of reform, the Scottish Government may wish to offer a type of incentive similar to that which was witnessed in the Netherlands. In order to promote the use of family mediation through court referral, the Dutch Minister of Justice introduced a temporary incentive contribution whereby the first two and a half hours of mediation were provided free of charge. However, whatever route the Scottish Government adopts, it must act immediately and should encompass encouragement of mediation both inside and outside the legal framework of the courts and solicitors as was achieved in England and Wales.

D. Training, Education and Regulation

At present, mediation generally and family mediation specifically, is a fragmented profession which ultimately requires regulatory unification. However, such a body would require statutory authority if it is to bring together the service and provide a widely accepted, professional service of family mediation to which parties can confidently be referred. Providing an assurance of quality as well as confidentiality will ultimately lead to an increase in uptake of mediation. The Scottish Government must provide for the regulation of family mediation to provide a mark of quality as well extending the current narrow scope of the Civil Evidence (Family Mediation) (Scotland) Act 1995 in order to provide complete confidentiality for all family mediation services.

As considered above, publicising the availability of mediation and educating the public of its benefits is essential. Likewise, education and training must be extended to the legal profession, encompassing both solicitors and judges to ensure they are aware of the benefits both they and their clients stand to gain. This should include legislation which lays down the qualifications required in order to become a mediator.\textsuperscript{131} Furthermore, recruitment and training must incorporate cultural considerations.

Retaining the link with the courts following a successful mediation agreement is also essential. Not only does it serve as a safeguard to ensure that agreements are suitable, equitable and legally binding but it also ensures that parties abide by the letter of the law. Furthermore, the Australian experience of eradicating this link with the courts completely through Family Relationship Centres has been shown to be the wrong course of action, with the Government now performing an embarrassing U-turn on the issue.\textsuperscript{132} However, one concept deriving from Australia which the Scottish Government may wish to adopt is a provision similar to the Family Law (Family Dispute Resolution Practitioners) Regulations 2008, which subjects mediation providers to a number of legal obligations and accreditation standards.

\section*{E. Is Timing Everything? – Temporal Considerations in Family Mediation}

In the context of whether family mediation should be compulsory, an important consideration is the point at which parties are introduced to mediation. This is particularly in terms of the psychological and emotional stage reached in the process of separation rather than the chronological stage.\textsuperscript{133} It would appear that the parties stand to derive greater benefits if they are introduced to mediation immediately, with the highest level of crisis being when the couples separate rather than during divorce.\textsuperscript{134} Parties may be more willing to welcome intervention in these early stages, as opposed to later in the process when feelings of hostility, resentment and bitterness become entrenched. This assertion is backed up by research from Australia and indeed other jurisdictions, with Parkinson noting:\textsuperscript{135}

\begin{quote}
There is ample evidence from the history of counselling in Australia and the experience of other jurisdictions that the earlier parents can be involved in negotiating a compromise to their dispute; the more likely it is that the dispute will be resolved.
\end{quote}

Effective referral to mediation prior to legal proceedings would, therefore, lead to reduced court caseloads with court referrals to mediation, again saving valuable time and money. Whilst mediation is most likely to be successful at first instance, gateways to mediation need to be open at all stages to encourage both its use and its

\textsuperscript{131} It could, for example, require all mediators to be accredited in order to practice.


\textsuperscript{133} Lewis (n 24) 3.

\textsuperscript{134} Parkinson, ‘Gateways to Mediation’ (n 110) 867.

success. Hence, in order for family mediation to succeed in Scotland, the parties, the legal professionals, the courts and the service providers alike must work together to ensure suitors are diverted to mediation when possible.

7. Conclusion

Family mediation is an important tool for dealing with family disputes, with multiple advantages to be gained from its use in comparison to court-based litigation. The benefits extend to parties beyond the dispute, encompassing children born of the relationship as well as subsequent partners. Evidence to support the existence of such benefits as well as significant fiscal considerations can be garnered not only from Scotland but throughout the world, with the high regard for family mediation apparent from the increasing adoption of the method internationally. The Scottish Government can no longer ignore such significant support for the method and should adopt measures which will lead to its increased use in Scotland.

It has been argued that family disputes are unique in comparison to other commercial or everyday disputes and they involve heightened emotional considerations, encompassing feelings of hostility, bitterness, resentment, fear and embarrassment. Nonetheless, there is a necessity for preservation of an on-going relationship in many of these cases due to the fact that children are involved. It is, therefore, imperative that separating couples have the opportunity to consider their problems in the more sympathetic method of family mediation before they are subjected to the adversarial and confrontational atmosphere of the court-process. The evidence suggests that litigation only makes things worse for the parties, their children, any subsequent partners and indeed wider society. Furthermore, it is apparent that orders made by the court are less likely to be enforced and this can lead to several subsequent court visits, yet further deterioration of relationships and most alarmingly, the increased suffering of the children. Litigation is no longer the best method available for dealing with such disputes; mediation is the future of dispute resolution in contemporary Scots family law.

Family mediation services are more widely available in Scotland than ever before and yet there is not an equally matched clientele engaging in the method. The public is simply not adequately informed in regard to the existence of this alternative method and indeed the many advantages it provides. Hence, first and foremost the Scottish Government must take steps to ensure that the availability of family mediation is more widely publicised, eradicating the discrepancies in accessibility at the same time as promoting the benefits. This broad education must not only include the public but also the legal profession. Promotion of family mediation must then be followed by official support, with the Scottish Government adopting a clear change in policy in favour of family mediation, similar to that witnessed in England and Wales.

Following this, tangible legal sources which support and encourage the use of family mediation in Scotland must be implemented. This should entail not only amending the current Rules of Court to encompass an element of compulsion but

136 Parkinson, ‘Gateways to Mediation’ (n 110) 868.
should also lead to the enactment of a comprehensive piece of legislation on the matter. The Scottish Government now has the privilege of a plethora of knowledge on the subject, with several countries having already witnessed the triumphs and potential pitfalls of implementing policy on family mediation. It is, therefore, in the position to ensure that family mediation and its implementation in Scotland is a success from the outset. In terms of producing effective legislation, it need only look to Scandinavia, with countries such as Norway and Sweden illustrating how to easily and adequately incorporate compulsory mediation into legislation.

Ultimately, take-up of mediation services in Scotland remains low and it would appear that the Scottish Government must resort to some form of mandatory provision akin to the Norwegian model but encompassing all separating couples, including those without children, in order to reverse this trend. There are several examples of other provisions which should be incorporated into a chapter of existing legislation similar to that in Finland or indeed in a wholly separate Act of the Scottish Parliament, such as a prerequisite similar to that in South Africa which ensures the welfare of children is best served during mediation. This is in addition to provisions which address the process of ‘screening out’ unsuitable cases and the punishment of those who make false accusations in this regard, as has been implemented in Australia. Furthermore, the regulation of family mediation in Scotland should be provided for through the imposition of mediation regulations. For example, the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 of Australia subject mediation providers to a number of legal obligations and accreditation standards. A comprehensive piece of legislation in this regard should also ensure increased confidentiality of family mediation proceedings, as currently the scope of the Civil Evidence (Family Mediation) (Scotland) Act 1995 is too narrow. This is causing confusion amongst mediation attendees and has become a significant barrier in terms of the process’ credibility.

Ultimately, if these recommendations are implemented, this would enable Scotland to become a centre of excellence for family mediation implementation, provision, regulation and most importantly success. At the same time, it will provide separating couples in Scotland with a quicker, simpler, cheaper and more beneficial method of dispute resolution. This would ensure a more amicable outcome in comparison to court-based litigation, providing better arrangements for them and more importantly, their children. Furthermore, considering the wider imminent shake-ups to the criminal and civil justice processes in light of the current economic climate, it is evident that now is the time for the Scottish Government to act. Rocketing criminal legal aid costs alongside criminal court and prison expenditure has led to heightened scrutiny of the civil system as savings have to be made by the Government in these times of ever increasing austerity. It is submitted that the status quo is fuelling unnecessary expenditure in respect of civil disputes by both the Government and the parties and reliance upon court processes which do not adequately serve the interests of the parties, their children or indeed wider society. The Scottish Government has the opportunity to rebalance the system; the time to act is now. As Victor Hugo famously said, ‘An invasion of armies can be resisted, but not an idea whose time has come.’